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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

*[Protest Alleging That Bid Was Improperly Rejected]*

FILE: B-199301

DATE: March 6, 1981

MATTER OF: H. R. Simon & Co., Inc.

**DIGEST:**

1. Protest concerning brand name only solicitation filed after notice of rejection of bid is timely where solicitation language did not clearly express brand name only restriction, protester had satisfactorily supplied "equal" product under several predecessor solicitations for same requirement, and agency procurement personnel had indicated to protester that its submission of "equal" product would be considered.
2. Contracting agency unreasonably restricted competition by limiting solicitation to brand name only product on basis of apparent misunderstanding of warranty requirements, and without any reasonable basis for limitation.

H. R. Simon & Co., Inc. (Simon), protests the award to S & W Chemical Services of a contract under solicitation No. DCGH JB/80071 issued by the D.C. General Hospital (DCGH) for the supply of certain x-ray development chemical and services. Simon alleges that its low bid was improperly rejected on the basis that only Kodak brand name chemical was considered acceptable when the RFP actually called for "brand name or equal" chemical, and Simon was known to supply acceptable "equal" chemical. We agree with the protester that DCGH improperly considered only Kodak chemical suppliers.

The original solicitation, issued on February 8, 1980, stated in part:

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"1. Solution: Contractor shall provide a Kodak Solution (Dev.-139-4832; fixer - 180-5332) or equal chemical solution. The price for the chemical solution shall be of a lesser price or equal to that offered on GSA (Kodak) schedule; any lesser price, the contractor shall assure the chemical solution is of equal quality."

A subsequent modification which provided additional information regarding the quantity of material which would be required changed the above requirement to read:

"1. Solution: Contractor shall provide a Kodak Solution (Dev.-139-4832; fixer - 180-5332). The price for the chemical solution shall be of a lesser price or equal to that offered on GSA (Kodak) schedule; any lesser price, the contractor shall assure the chemical solution is of equal quality."

Simon asserts that this and another later amendment were provided in response to questions it raised concerning quantity information which it had advised DCGH was required in order to adequately prepare a bid. DCGH asserts that the main purpose of the initial amendment was to restrict the requirement to Kodak chemical only. In its initial report, DCGH contended that this restriction was required in order to maintain warranty protection on certain equipment which it had recently acquired.

A threshold question concerns the timeliness of the protest which was not filed until after bid opening and appears to question the propriety of a restrictive clause, which should have put Simon on notice that its bid would be unacceptable. See, Tate Engineering, Inc., B-193904, February 12, 1979, 79-1 CPD 98. However, Simon asserts, and DCGH does not dispute, that Simon had supplied the hospital with non-Kodak chemical which had been found acceptable under contracts during 4 of the last 5 years. It is also uncontroverted that, even after the issuance of the amendment, hospital procurement personnel had indicated to Simon that its bid offering non-Kodak chemical would be considered.

In addition, Simon points out that the Kodak only language in the above-quoted amendment is immediately followed by language requiring assurance that if chemical is offered at a lesser price than that on the GSA Kodak schedule, the contractor

shall assure the chemical solution is of equal quality. This language seems to contemplate the supply of chemical other than Kodak. We agree that under these circumstances, Simon was not apprised of the brand name only restriction until it received notice of the agency's rejection of its bid. Federal Data Corporation, B-192549, April 6, 1979, 79-1 CPD 241. Thus, the protest is timely.

DCGH explained that the equipment vendor had recommended the use of Kodak chemical and that during a 6-month period after acquisition of the new equipment, it had used only Kodak chemical and observed that cost savings occurred and results improved in that the number of "retakes" required decreased. However, DCGH does not dispute the protester's assertion that these results may have been due to the new equipment, per se, rather than the chemical. Moreover, in response to Simon's allegation that, in fact, Picker, rather than Kodak, chemical had been used with this new equipment over the time period in question, DCGH essentially conceded this to be correct.

As a general rule, specifications must be expressed in terms of salient physical and functional requirements necessary to meet the Government's needs, in order to insure maximum competition in procurements. See Federal Procurement Regulations, 41 C.F.R. §§ 1-1.305, 307-1(a) (1980), and D.C. Material Management Manual § 2620.2(E)(1)(a). When it is appropriate, however, the Government may designate an item as "brand name or equal," and in the requisite circumstances procurement of brand name only may be permissible. However, such a restriction is appropriate only under limited circumstances. As stated in the D.C. Material Management Manual § 2620.2(E)(1)(b):

"Purchase descriptions used in competitive procurements shall not specify a product having features which are peculiar to the product of one manufacturer, producer, or distributor, and thereby preclude consideration of a product of another company, unless it has been determined that those particular features are essential to the Government's requirements, and that similar products of other companies lacking those features would not meet the minimum requirements for the item."

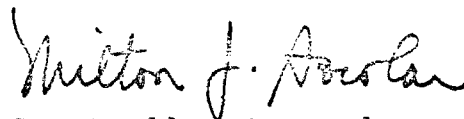
DCGH has failed to provide any support for its contention that only Kodak chemical has the particular features which are essential to its requirements. In its

final submission, DCGH argued essentially that the Kodak only restriction was intended to reduce cost, "standardize" certain procedures, and improve quality. However, it had previously conceded that it had no proof that Kodak chemical either reduced cost or improved quality since the "evidence" on which it based this conclusion actually involved use of non-Kodak chemical. The standardization argument is unsupported and also is undercut by the fact that the hospital was actually using non-Kodak chemical which it apparently believed was Kodak chemical.

As a general rule, we have held that when a specification is challenged with some support as restrictive of competition, it is incumbent on the procuring activity to establish prima facie support showing that the restriction imposed is reasonably related to its actual needs. Gerber Scientific Instrument Company, B-197265, April 8, 1980, 80-1 CPD 263; Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437. In this instance, DCGH has adduced no evidence whatsoever to support its position that the clearly restrictive brand name only requirement was reasonably related to its actual needs.

Accordingly, the protest is sustained.

Nevertheless, in view of the fact that the contract has been substantially completed, no remedial action is feasible. We note the indication by DCGH that future procurements for this requirement will not be restricted to Kodak chemical. By separate letter of today, we are advising the Executive Director of the D. C. General Hospital of the above procurement deficiency.



Acting Comptroller General  
of the United States